

U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
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**U.S. Citizenship
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Services**

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FILE: [REDACTED] Office: NEBRASKA SERVICE CENTER Date:
SRC 07 800 26570

NOV 06 2009

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[REDACTED]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

A handwritten signature in black ink, appearing to read "Perry Rhew".

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center, denied the employment-based immigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will dismiss the appeal.

The petitioner seeks classification pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), as a member of the professions holding an advanced degree. At the time he filed the petition, the petitioner was a postdoctoral research fellow at Purdue University, West Lafayette, Indiana. He indicated that this employment would end in May 2008. He subsequently accepted a postdoctoral position at the Jet Propulsion Laboratory (JPL), operated by the National Aeronautics and Space Administration at the California Institute of Technology. The petitioner asserts that an exemption from the requirement of a job offer, and thus of a labor certification, is in the national interest of the United States. The director found that the petitioner qualifies for classification as a member of the professions holding an advanced degree, but that the petitioner has not established that an exemption from the requirement of a job offer would be in the national interest of the United States.

On appeal, the petitioner submits a brief from counsel, new witness letters, and copies of materials already in the record.

Section 203(b) of the Act states, in pertinent part:

(2) Aliens Who Are Members of the Professions Holding Advanced Degrees or Aliens of Exceptional Ability. --

(A) In General. -- Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.

(B) Waiver of Job Offer –

(i) . . . the Attorney General may, when the Attorney General deems it to be in the national interest, waive the requirements of subparagraph (A) that an alien's services in the sciences, arts, professions, or business be sought by an employer in the United States.

The director did not dispute that the petitioner qualifies as a member of the professions holding an advanced degree. The sole issue in contention is whether the petitioner has established that a waiver of the job offer requirement, and thus a labor certification, is in the national interest.

Neither the statute nor the pertinent regulations define the term "national interest." Additionally, Congress did not provide a specific definition of "in the national interest." The Committee on the

Judiciary merely noted in its report to the Senate that the committee had "focused on national interest by increasing the number and proportion of visas for immigrants who would benefit the United States economically and otherwise. . ." S. Rep. No. 55, 101st Cong., 1st Sess., 11 (1989).

Supplementary information to regulations implementing the Immigration Act of 1990 (IMMACT), published at 56 Fed. Reg. 60897, 60900 (November 29, 1991), states:

The Service [now U.S. Citizenship and Immigration Services (USCIS)] believes it appropriate to leave the application of this test as flexible as possible, although clearly an alien seeking to meet the [national interest] standard must make a showing significantly above that necessary to prove the "prospective national benefit" [required of aliens seeking to qualify as "exceptional."] The burden will rest with the alien to establish that exemption from, or waiver of, the job offer will be in the national interest. Each case is to be judged on its own merits.

Matter of New York State Dept. of Transportation, 22 I&N Dec. 215 (Commr. 1998), has set forth several factors which must be considered when evaluating a request for a national interest waiver. First, it must be shown that the alien seeks employment in an area of substantial intrinsic merit. Next, it must be shown that the proposed benefit will be national in scope. Finally, the petitioner seeking the waiver must establish that the alien will serve the national interest to a substantially greater degree than would an available U.S. worker having the same minimum qualifications.

It must be noted that, while the national interest waiver hinges on prospective national benefit, it clearly must be established that the alien's past record justifies projections of future benefit to the national interest. The petitioner's subjective assurance that the alien will, in the future, serve the national interest cannot suffice to establish prospective national benefit. The inclusion of the term "prospective" is used here to require future contributions by the alien, rather than to facilitate the entry of an alien with no demonstrable prior achievements, and whose benefit to the national interest would thus be entirely speculative.

We also note that the regulation at 8 C.F.R. § 204.5(k)(2) defines "exceptional ability" as "a degree of expertise significantly above that ordinarily encountered" in a given area of endeavor. By statute, aliens of exceptional ability are generally subject to the job offer/labor certification requirement; they are not exempt by virtue of their exceptional ability. Therefore, whether a given alien seeks classification as an alien of exceptional ability, or as a member of the professions holding an advanced degree, that alien cannot qualify for a waiver just by demonstrating a degree of expertise significantly above that ordinarily encountered in his or her field of expertise.

The petitioner filed the petition on July 30, 2007. The petitioner's work involves radio occultation (RO) of signals from Global Positioning System (GPS) satellites. The petitioner submitted copies of five published articles (three in Chinese, two in English) and an unpublished manuscript, as well as evidence of his participation in professional conferences.

[REDACTED] stated:

[The petitioner's] thesis focused on finding a solution to a systematic problem when using GPS RO to profile the lowest 0.5 to 2 miles of the atmosphere. . . . The 24 GPS satellites continuously radiate microwave signals over the entire Earth for precisely determining the positions of the aircraft, ships etc. In 1987 researchers at JPL [the Jet Propulsion Laboratory at the California Institute of Technology (Caltech)] recognized that these GPS signals could be used to profile the atmosphere. The basic idea is that as GPS radio signals pass through the atmosphere, they slow down very slightly, depending on how dense the atmosphere is and how much water vapor it contains. This slowing can be measured very precisely and used to profile the vertical temperature, pressure and water vapor structure of the atmosphere. The atmospheric profiles that are derived from the GPS RO measurements provide an unusual combination of high vertical resolution, high precision and insensitivity to clouds, a combination that far surpasses other satellite observing systems and provides profiles of the atmosphere in any weather conditions. Therefore GPS RO will contribute significantly to improving weather prediction for both civilian and military applications.

There is however a problem for GPS RO at the vertical transition between the planetary boundary layer (PBL) and the overlying troposphere, particularly over the oceans. . . . While other satellite instruments cannot profile the very important boundary layer, the GPS RO measurements have the vertical resolution and cloud penetrating capabilities to do so. It is very important that we be able to measure the properties of the PBL from orbit as its vertical structure is a critical input for both civilian and military weather forecasting as well as determining how our climate is changing.

The problem with GPS RO is it systematically underestimates the atmospheric density and specifically the amount of water vapor in the PBL . . . [which] will make the atmosphere appear to be less likely to produce severe weather than it actually is. In extreme cases this would result in forecasts that underestimate the intensity of hurricanes. . . .

[The petitioner] came up with an entirely new approach to deriving density and water vapor from the GPS RO in the PBL that overcomes the problem of GPS systematic underestimation of the PBL density and water vapor. . . .

It is [the petitioner's] unique background that caused his present boss, [REDACTED] [REDACTED] at Purdue University, to be willing to wait quite a while for him to finish his PhD at the University of Arizona. He was simply the only recent PhD and therefore post-doctoral scholar around with the right background to support her GPS RO related research.

University of Arizona Professor Emeritus [REDACTED] stated: "When the [petitioner's] technique finds it's [sic] way into [the] modeling community, it should have a noticeable effect on the accuracy of the initial atmospheric conditions used as input to the forecast models."

University of Arizona [REDACTED] who served on the petitioner's dissertation committee, stated that the petitioner "is now a unique intellectual asset for the U.S."

Purdue University Assistant [REDACTED], the petitioner's supervisor at the time of filing, stated:

[The petitioner's] Ph.D. work on the use of GPS radio occultation to measure the humidity and temperature in the atmosphere just above the surface of the ocean addresses one of the main problems in applying this technique globally. The great potential of the GPS radio occultation technique is that measurements can be made everywhere on the globe and not just at select points above weather stations. . . .

Since he has been at Purdue he has developed techniques for making similar observations with GPS receivers on board an aircraft. This is an \$800,000 research project, entitled "Occultation Instrument for Atmospheric, Oceanographic and Land Remote Sensing from the High Performance Instrumented Airborne Platform for Environmental Research (HIAPER)." . . . The instrumentation will provide measurements to help understand the chemistry of the upper atmosphere that affects climate and climate change. The instrument developed by our laboratory will provide critical profiles of atmospheric humidity and temperature that support this effort. The instrument is also a prototype of a future operational system that could potentially provide dense sampling of the atmosphere by being deployed on commercial aircraft. This would increase by more than a hundred-fold the amount of data to input to the operational weather forecast models.

[The petitioner's] role has been the development of the software for the analysis of this unique type of data in order to extract the humidity information.

[REDACTED] asserted that she also expected the petitioner to play critical roles in two proposed future projects. As we have already noted, the petitioner indicated that he would leave Purdue in May 2008, and USCIS records confirm that the petitioner changed employers at that time. We will consider the significance of the petitioner's past work at Purdue, but his departure from that university forecloses any argument that he should receive the waiver because he will be needed in [REDACTED] laboratory.

Purdue Assistant [REDACTED] stated: "There is no question in my mind that [the petitioner] is among the top rank of specialist[s] in the world. . . . His unique expertise has made him indispensable to our scientific community and of course to this country."

a research scientist on the Senior Technical Staff at JPL, first encountered the petitioner's work at a 2005 conference:

[The petitioner] gave a very impressive poster presentation, which summarized his ground-breaking retrieval technique which could greatly reduce the errors in the GPS RO observation within the PBL. . . . I was working on [a] similar topic at that time and became very inspired by his work. . . .

I am currently working with [the petitioner] on refining his novel technique. In the foreseeable future, his retrieval technique could be incorporated into the JPL data processing package, which should significantly improve the GPS RO observations in the PBL.

The petitioner submitted a copy of an article in which [REDACTED] cited the petitioner's work. We will discuss this citation in further detail later in this decision.

[REDACTED] Visiting Scientist at the University Corporation for Atmospheric Research (UCAR) stated:

I have known [the petitioner] for six years and I am very familiar with his research because I have worked closely with him since he came to the United States in 2001. . . . Currently I work with GPS RO data from a six-satellite constellation called COSMIC (Constellation Observing System for Meteorology, Ionosphere and Climate). . . .

Since I left the University of Arizona in 2004, [the petitioner] and I have worked remotely together on several projects. . . .

I am convinced that the novel retrieval method developed by [the petitioner] will help researche[r]s better understand the structure and dynamics of the lowest few kilometers of the atmosphere. Furthermore, [the petitioner's] research on this topic could advance air pollution simulations and other small-scale regional weather and climate studies.

a research scientist at UCAR's National Center of Atmospheric Research (NCAR), stated that the petitioner's "outstanding works" have "made a great contribution to the GPS remote sensing studies."

On October 6, 2008, the director issued a request for evidence, instructing the petitioner to "submit copies of published articles by other researchers citing or otherwise recognizing the self-petitioner's . . . research and/or contributions," or documentary evidence of such citations. The director stated that the petitioner must "establish . . . a past record of specific prior achievement that justified projections of future benefit to the national interest." The director stated that articles that the petitioner published after the filing date "have no bearing on these proceedings" because, under 8 C.F.R. § 103.2(b)(1), the petitioner must be eligible as of the filing date.

In response, the petitioner did not address the director's request for evidence of citation of his work. Instead, the petitioner submitted further witness letters, copies of new articles published after the filing date, evidence of grant funding, and documentation showing that the petitioner has participated in peer review of manuscripts. The petitioner did not show that grant funding, writing articles, or reviewing manuscripts by others are intrinsic evidence of the importance or impact of one's work in the field, rather than expected functions of competent workers in his field.

Two of the four new letters are from researchers at JPL, where the petitioner began working around the time the director issued the request for evidence. [REDACTED] Principal Research Scientist and the petitioner's supervisor at JPL, investigates "fine-structure phenomena in . . . high-resolution GPS RO measurements" taken by the COSMIC satellites. [REDACTED] stated: "Based on his solid research credentials, I can certify that [the petitioner] has established [himself] to be among the best scientists in his field" who has had "and will continue to have a significant impact on this field of research.

[REDACTED] of the Ionospheric and Atmospheric Remote Sensing Group at JPL, stated:

A significant source of systematic error in GPS RO measurements originates in the lower troposphere (normally below 5 km) under conditions when the signal becomes trapped or "ducted" by the atmosphere. . . . [S]cientists from around the world (including our group) have spent [a] significant amount of effort to investigate this specific issue.

There had not been any major advancement of solving the ducting problem until [the petitioner's] work. . . . He clearly demonstrated the physical basis of the problem, and proposed an innovative solution based on a sophisticated analysis of signal structure near the ducting layer. This is an unprecedented achievement in the field. . . . I expect that his future work will significantly improve the lower troposphere RO measurements and produce notably positive impact on the operational weather forecasting models even more than has been achieved already at higher altitudes.

Beyond any doubt, [the petitioner] has contributed significantly to GPS remote sensing and atmospheric science . . . [and] established a reputation as a leading scientist in his field.

[REDACTED] of the Data Assimilation Testbed Center at the National Center for Atmospheric Research, stated:

I have not worked with [the petitioner]; yet I am aware of his research accomplishments through his presentations at international conferences as well as his publications in top scientific journals. It is my professional judgment that [the petitioner] is a distinguished scientist who has made and continues to make crucial contributions to his field.

. . . [The petitioner] took a lead role in developing the retrieval system for the [HIAPER] observations. I am most impressed by his pioneering work on comprehensively analyzing the error characteristics of the airborne observing system. . . . Thanks to [the petitioner's] work, we now have better understanding of the sophisticated observing system structures and the fundamental physics of the retrieval system. [The petitioner] is surely the one who has gone far beyond his peers and become indispensable to such a high-tech and highly valuable airborne observing system.

[The petitioner] is without any doubt an important pioneer whose influence on the GPS RO field far exceeds that of others with comparable academic qualifications. His original work has improved fundamentally our understanding of the space-borne and airborne GPS RO measurements in the lower troposphere and I firmly believe his future research will help improv[e] the use of GPS RO in weather forecasts.

[REDACTED] at the German Research Centre for Geosciences, stated:

Though I have never worked with [the petitioner], I am very familiar with his work through his papers. I first knew him at the 2nd GPS Radio Occultation Data Users Workshop in 2005. . . . [The petitioner's] approach was the first direct solution to correct the super-refraction errors, which has opened up a new era for ABL [atmospheric boundary layer] research. [The petitioner's] breakthrough research attracted . . . wide attention from the conference attendees and contributed significantly to the success of the conference. . . .

His group [at Purdue] has developed a GPS recording system to be implemented [in the HIAPER project]. . . . [The petitioner] has contributed significantly to this research. . . . He clearly demonstrated the feasibility and the expected accuracy of the new system. Moreover, [the petitioner] developed an occultation prediction software that has been used to provide the fly trajectory guidance for the pilot to optimize the best possible measurement. . . . Undoubtedly, his research results were essential for the[] recent success of real-time aircraft measurements in the Gulf of Mexico. This work has influenced many scientists in the field. Actually his work has influenced mine too. Recently our group is developing a system similar to that of [the petitioner's] group. With great benefits from their pre[v]ious field campaign experience, we can successfully build ours.

The director denied the petition on January 30, 2009. The director repeated that "[a]rticles published after the date of filing have no bearing on these proceedings," and found that the petitioner had not shown "[f]requent citation" of his "modest publication record." The director acknowledged the witness letters, but found that if the petitioner's work were truly of great significance, there would be more evidence of that significance than a handful of witness letters, mostly from the petitioner's own professors and collaborators.

On appeal, the petitioner submits a printout from Google Scholar (<http://scholar.google.com>), identifying three articles that cited the 2006 article in which the petitioner described his GPS RO work. The petitioner did not explain why he did not submit such a list when the director specifically asked for evidence of citation in the request for evidence. The petitioner was put on notice of required evidence and given a reasonable opportunity to provide it for the record before the director issued the decision. The petitioner failed to submit the requested evidence at the time, and now submits it on appeal. The AAO need not consider this untimely submission. *See Matter of Soriano*, 19 I&N Dec. 764, 766 (BIA 1988); *Matter of Obaigbena*, 19 I&N Dec. 533, 537 (BIA 1988).

The only previous evidence of citation of the petitioner's work appeared in the initial submission. [REDACTED]

stated: "I have . . . cited [the petitioner's] paper in my paper published on American Geophysical Union Radio Sciences in 2007." The petitioner submitted a copy of [REDACTED] paper, "Effect of ducting on radio occultation measurements: An assessment based on high-resolution radiosonde soundings." In that paper, [REDACTED] wrote: "A promising approach to invert refractivity in the presence of ducts has recently been proposed [Xie et al., 2006], but more work is needed to validate its effectiveness when applied to real data." In submitting the citing article, the petitioner highlighted the first part of the sentence, but not the second part. The next paragraph of [REDACTED] article begins with: "Until a reliable way is devised to filter out data affected by ducting . . .," indicating that no "reliable way" yet existed. In context, this citation does not indicate that the petitioner has definitively solved the problem of ducting or superrefraction. Rather, the only submitted citation of the petitioner's work emphasizes the tentative and unproven nature of the petitioner's technique.

Two new letters accompany the appeal. NCAR Scientist [REDACTED] stated "I have not worked with [the petitioner]," but [REDACTED] served on a review committee when the petitioner applied for a postdoctoral fellowship at NCAR, and, as a researcher at Purdue, the petitioner participated in creating instruments specifically for use by NCAR researchers. Therefore, it would not be entirely accurate to call [REDACTED] an independent witness. [REDACTED] listed the petitioner's various projects, declared each to be important, and concluded that the petitioner "is without a doubt an important pioneer whose influence in his field far exceeds that of others with comparable academic qualifications."

Director of NCAR's Earth and Sun Systems Laboratory, who has "known [the petitioner] for several years," stated that the petitioner's "work on airborne GPS measurements is especially novel" and that the petitioner "has demonstrated exceptional skills and abilities." The new letters submitted on appeal are broadly similar to those submitted previously.

Counsel somewhat exaggerates the nature of the petitioner's evidence, claiming that "world-famous experts in the field . . . have attested to their reliance on Appellant's work" and that the petitioner submitted "four (4) letters from independent sources." Some of the sources said to be independent are researchers at NCAR, an entity in collaboration with the laboratories where the petitioner has worked. One witness described as independent had evaluated the petitioner's application for a fellowship at NCAR, stating that the petitioner ranked highly but stopping short of confirming that NCAR actually offered the petitioner the job.

Counsel is correct that independent witness letters have weight in national interest waiver proceedings. This does not mean, however, that all the petitioner must do is locate willing witnesses whom he or she has not personally met. We must judge the content of the letters, both individually and in the context of the record as a whole.

In this instance, the petitioner has submitted little documentary evidence of the influence of his work, either in the form of citations or otherwise. The record does not establish that research groups are actively using the petitioner's work to a greater extent than would be typically expected from the normal dissemination of a given researcher's findings. References to one of the petitioner's papers as a "landmark" do not become persuasive simply through repetition. A handful of attendees at a 2005 conference have stated that the petitioner's presentation there attracted great interest, but these witnesses cannot speak for others and nothing exists to support these claims except for letters written specifically for the petitioner's benefit. The only citing reference known to exist prior to the filing date indicated only that the petitioner's work was promising but unproven. After careful and thorough consideration of the materials presented, we are not persuaded that the petitioner has provided sufficient support for the waiver claim. At best, the petition appears to be premature, filed at a time when the field had not reacted to the petitioner's work except where the petitioner solicited those reactions himself. This does not rule out the possibility that the petitioner may subsequently become eligible for the waiver, but the evidence does not persuade us that the petitioner was already eligible when he filed this petition.

As is clear from a plain reading of the statute, it was not the intent of Congress that every person qualified to engage in a profession in the United States should be exempt from the requirement of a job offer based on national interest. Likewise, it does not appear to have been the intent of Congress to grant national interest waivers on the basis of the overall importance of a given profession, rather than on the merits of the individual alien. On the basis of the evidence submitted, the petitioner has not established that a waiver of the requirement of an approved labor certification will be in the national interest of the United States.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

This decision is without prejudice to the filing of a new petition by a United States employer accompanied by a labor certification issued by the Department of Labor, appropriate supporting evidence and fee.

ORDER: The appeal is dismissed.